U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 6583001

Date: MAR. 23, 2021

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Advanced Degree Professional

The Petitioner seeks to employ the Beneficiary as a big data engineer. It requests classification of the Beneficiary as a member of the professions holding an advanced degree under the second preference immigrant classification. Immigration and Nationality Act section 203(b)(2), 8 U.S.C. § 1153(b)(2). This employment-based immigrant classification allows a U.S. employer to sponsor a professional with an advanced degree for lawful permanent resident status.

The Director of the Texas Service Center denied the petition, concluding that the Petitioner did not establish that it made a *bona fide* job offer to the Beneficiary or that it intends to employ the Beneficiary in the offered position. The Director also determined that the Petitioner did not intend to employ the Beneficiary in a permanent, full-time position.

In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit. Section 291 of the Act, 8 U.S.C. § 1361. Upon *de novo* review, we will withdraw the Director's decision and remand the matter for entry of a new decision.

I. THE EMPLOYMENT-BASED IMMIGRATION PROCESS

Employment-based immigration generally follows a three-step process. First, an employer obtains an approved labor certification from the U.S. Department of Labor (DOL).[1] *See* section 212(a)(5) of the Act, 8 U.S.C. § 1182(a)(5). By approving the labor certification, the DOL certifies that there are insufficient U.S. workers who are able, willing, qualified, and available for the offered position and that employing a foreign national in the position will not adversely affect the wages and working conditions of domestic workers similarly employed. *See* section 212(a)(5) of the Act. Second, the employer files an immigrant visa petition with U.S. Citizenship and Immigration Services (USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154. Third, if USCIS approves the petition, the foreign national applies for an immigrant visa abroad or, if eligible, adjustment of status in the United States. *See* section 245 of the Act, 8 U.S.C. § 1255.

[1] The priority date of a petition is the date the DOL accepted the labor certification for processing, which in this case is October 12, 2018. *See* 8 C.F.R. § 204.5(d).

II. THE BONA FIDES OF THE JOB OFFER

A business may file a petition if it is "desiring and intending to employ [a foreign national] within the United States." Section 204(a)(1)(F) of the Act. A petitioner must intend to employ a beneficiary under the terms and conditions specified in an accompanying labor certification. *See Matter of Izdebska*, 12 I&N Dec. 54, 55 (Reg'l Comm'r 1966) (affirming a petition's denial where, contrary to the terms of the accompanying labor certification, the petitioner did not intend to employ the beneficiary as a domestic worker on a full-time, live-in basis); *see also Matter of Semerjian*, 11 I&N Dec. 751, 752 (Reg'l Comm'r 1966) (immigrant with approved professional worker petition must show *bona fide* intent to engage in his profession in the U.S.).[2] A petitioner must establish this intent to employ a beneficiary in a *bona fide* position at the time of filing. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971). For labor certification purposes, the job offer must be for permanent, full-time work. *See* 20 C.F.R. § 656.3; *see also* 20 C.F.R. § 656.10(c)(10).

The labor certification and the petition indicate that the Petitioner is located in [redacted] Michigan. The Petitioner attested on the petition and the labor certification that it intends to employ the Beneficiary in the permanent, full-time position of big data engineer at [redacted] in [redacted] Florida. Specifically, on the labor certification, it states that the work will be performed as follows:

> H. Job Opportunity Information (Where work will be performed)
>
> 1. Primary worksite (where work is to be performed) address 1
>
> [redacted] FL [redacted]

Similarly, on the petition, the Petitioner stated that the worksite location would be as follows:

> Part 6. Worksite Location
>
> For Item Numbers 9.a. – 9.e., provide the address where the person will work if different from the address provided in Part 1.
>
> 9.a.-9.e. [redacted] FL [redacted]

The labor certification does not indicate that the job requires travel to any other worksites. In a request for evidence (RFE), the Director noted that the address where the Beneficiary will work in [redacted] Florida, is not the same as the Petitioner's address. He stated that it is not evident that the Beneficiary will be working for the Petitioner. The Director also indicated that the Petitioner operates a personnel staffing business that employs workers on a temporary basis. He requested evidence relating to the Beneficiary's employment, including copies of any contracts relating to the Beneficiary's

[2] In *Matter of Semerjian*, the Regional Commissioner considered an immigrant visa petition which had been filed by the beneficiary on his own behalf. The district director denied the petition after determining that the petitioner/beneficiary had failed to establish that he intended to pursue the profession upon which the petition was based, that of a mechanical engineer. On appeal, the Regional Commissioner considered the Congressional intent of the Act with regard to qualified immigrants who are members of the professions and concluded that the beneficiary must have "a *bona fide* purpose or intent to work in the United States in his qualifying endeavor." *Id.* at 754.

employment. In response to the RFE, the Petitioner provided a letter from [redacted]; an employment agreement between the Petitioner and the Beneficiary; and the Beneficiary's pay statements.

In his denial decision, the Director found inconsistencies in documents relating to the Beneficiary's start date with the Petitioner.[3] The Director indicated that the labor certification and the Beneficiary's pay statements indicate that the Beneficiary started work with the Petitioner on April 3, 2018; his employment agreement with the Petitioner was signed January 29, 2019; and the letter from [redacted] indicates that work began on March 12, 2018. The Director stated that the employment agreement should have been signed prior to the priority date, because eligibility must be established at the time of filing. Based on the inconsistencies in the Beneficiary's start date with the Petitioner, the Director concluded that the Petitioner did not establish that it made a *bona fide* job offer to the Beneficiary or that it intends to employ the Beneficiary in the offered position.

On appeal, the Petitioner asserts that it is not required to provide an employment agreement between it and the Beneficiary, and that it has met the statutory requirements for the requested classification. It cites several cases for the proposition that beneficiaries can be qualifying permanent employees of staffing and recruiting companies. It further asserts that the payroll documents and employment agreement establish that the Petitioner is the Beneficiary's employer; that the Petitioner intended to employ the Beneficiary at the time the petition was filed; and that its intention to employ the Beneficiary continues.

Although the Director noted inconsistencies in the evidence relating to the Beneficiary's start date with the Petitioner, he did not clarify how the inconsistencies in record regarding the Beneficiary's start date in nonimmigrant status relate to the *bona fides* of the job offer or the Petitioner's intention to employ the Beneficiary in the offered position on a permanent, full-time basis.[4] Thus, as further detailed below, we will withdraw the Director's decision and remand the matter to the Director to request additional evidence of the *bona fides* of the job offer and evidence that the Petitioner intends to employ the Beneficiary in the offered position on a permanent, full-time basis.

As previously noted, the Petitioner must intend to employ the Beneficiary in a *bona fide* position under the terms of the labor certification.[5] Here, the chain of employment related to the offered position appears to include three entities: the Petitioner, [redacted], and [redacted]. It appears that the Petitioner, a Michigan limited liability company, has a contractual relationship with [redacted][6] to provide staffing related to [redacted] services agreement with [redacted] in [redacted], Florida.

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[3] Inconsistencies in the record can raise serious concerns about the veracity of a petitioner's assertions. Doubt cast on any aspect of a petitioner's proof may undermine the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

[4] The Petitioner was not required to employ the Beneficiary prior to filing the labor certification.

[5] The labor certification states that the requirements of the offered job are a master's degree in IT or any engineering degree, and 12 months of experience in the job offered or in any substantially similar position to the offered job. However, other evidence in the record indicates that the job requires only a bachelor's degree, and that no experience is required. Thus, based on inconsistencies in the record, it is not clear that the job requires a professional holding an advanced degree. *See* 8 C.F.R. § 204.5(k)(4)(i).

[6] The letter from [redacted] in the record does not indicate where the business is located.

DOL's regulations require an employer to give notice of the filing of the application for permanent employment certification,[7] to conduct required pre-filing recruitment including placing a job order and advertisements,[8] and to prepare a recruitment report[9] as part of a pre-filing recruitment effort. The job order and advertisements must be placed in the area of intended employment. *Id.* Newspaper advertisements must also provide "a description of the vacancy specific enough to apprise the U.S. workers of the job opportunity for which certification is sought" and "indicate the geographic area of employment with enough specificity to apprise applicants of any travel requirements and where applicants will likely have to reside to perform the job opportunity." 20 C.F.R. § 656.17(f)(4). On remand, the Director should request the Petitioner's notice of filing and recruitment to clarify the *bona fides* of the job offer and to confirm how and where the job was advertised to U.S. workers. The documentation should have apprised U.S. workers that the job opportunity is located in [redacted] Florida, as this was the primary worksite listed on the labor certification.

The Petitioner requested a prevailing wage determination (PWD) pursuant to the provisions of 20 C.F.R. § 656.40. The labor certification indicates the prevailing wage tracking number and the PWD date of September 27, 2018. The prevailing wage was determined by considering the "wages of workers similarly employed in the area of intended employment," as that job was described by the Petitioner on the application for the PWD.[10] The Director should request a copy of the Petitioner's PWD to further clarify the *bona fides* of the job offer and to confirm that the wage was determined based on proposed employment in [redacted] Florida, as indicated by the terms of the certified labor certification.

As noted, the Petitioner must intend to employ the Beneficiary in the offered position on a permanent, full-time basis. In his decision, the Director noted that the employment agreement between the Petitioner and the Beneficiary states that the Petitioner intends to employ the Beneficiary for a "temporary period." Thus, the Director found that the Petitioner did not demonstrate its intention to employ the Beneficiary on a permanent, full-time basis. On appeal, the Petitioner asserts that the employment agreement references the Beneficiary's nonimmigrant employment. It asserts that it is not required to provide an employment agreement with specific language regarding continued employment. The Petitioner asserts that it intends to employ the Beneficiary in the offered position on a permanent, full-time basis.

The employment agreement submitted by the Petitioner in response to the RFE is inconsistent with the Petitioner's assertion on appeal that it intends to employ the Beneficiary on a permanent, full-time basis. The Petitioner must resolve inconsistencies in the record with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). While the employment agreement may have been executed in anticipation of the Beneficiary's temporary, nonimmigrant employment, the record does not contain independent, objective evidence of the Petitioner's intent to employ the Beneficiary on a permanent, full-time basis for the position and location of work certified. *Id.* Instead, the record indicates that the work at [redacted] may be extended for three years, but the extension may be denied and the work may be cancelled at any time with at least 10 days' notice. Termination of the project extension or cancellation of the work would

[7] 20 C.F.R. § 656.10(d).
[8] 20 C.F.R. §§ 656.17(e), (f). The labor certification indicates that the advertisements were placed in the [redacted]
[9] 20 C.F.R. § 656.17(g).
[10] 20 C.F.R. § 656.40(b)(2).

end the full-time work certified in the labor certification. A petitioner must establish eligibility for a requested benefit as of a petition's filing and continuing throughout its adjudication. 8 C.F.R. § 103.2(b)(1). On remand, the Director should request independent, objective evidence demonstrating that the Petitioner intends to employ the Beneficiary on a full-time, permanent basis.

In sum, as set forth above, we will withdraw the Director's decision and remand the matter to the Director to request additional evidence of the *bona fides* of the job offer and evidence that the Petitioner intends to employ the Beneficiary in the offered position on a permanent, full-time basis.

III. ABILITY TO PAY

The Director should determine on remand whether the Petitioner has the continuing ability to pay the proffered wage. The proffered wage is $55.00 per hour ($114,400 per year based on a 40-hour work week).[11] The Petitioner must demonstrate its continuing ability to pay the proffered wage from the priority date in 2018 until the Beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). The regulation requires that "[e]vidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements." *Id.*

The Petitioner submitted its tax return for 2017. However, without annual reports, federal tax returns, or audited financial statements for 2018 onward, we cannot affirmatively find that the Petitioner has the continuing ability to pay from the priority date. We note that the Petitioner has filed dozens of additional Form I-140 petitions. Where a petitioner has filed Form I-140 petitions for multiple beneficiaries, it must demonstrate that its job offer to each beneficiary is realistic, and that it has the ability to pay the proffered wage to each beneficiary. *See* 8 C.F.R. § 204.5(g)(2); *see also Patel v. Johnson*, 2 F. Supp. 3d 108, 124 (D. Mass. 2014) (upholding our denial of a petition where a petitioner did not demonstrate its ability to pay multiple beneficiaries). Thus, the Petitioner must establish its ability to pay this Beneficiary as well as the beneficiaries of its other Form I-140 petitions that were pending or filed after the priority date of the current petition.[12]

The Petitioner must document the receipt numbers, names of the beneficiaries, priority dates, and proffered wages of the other petitions, and indicate the status of the petitions and the date of any status change (i.e., pending, approved, withdrawn, revoked, denied, on appeal or motion, beneficiary obtained lawful permanent residence). To offset the total wage burden, the Petitioner may submit documentation showing that it paid wages to other beneficiaries. To demonstrate that it has the ability to pay this Beneficiary and the other beneficiaries, the Petitioner must, for each year at issue (a) calculate any shortfall between the proffered wages and any actual wages paid to the primary Beneficiary and its other beneficiaries, (b) add these amounts together to calculate the total wage deficiency, and (c) demonstrate that its net income or net current assets exceed the total wage

[11] The Petitioner paid the Beneficiary less than the proffered wage in 2018.

[12] The Petitioner's ability to pay the proffered wage of one of the other I-140 beneficiaries is not considered:

- After the other beneficiary obtains lawful permanent residence;
- If an I-140 petition filed on behalf of the other beneficiary has been withdrawn, revoked, or denied without a pending appeal or motion; or
- Before the priority date of the I-140 petition filed on behalf of the other beneficiary.

deficiency.[13] Without this information, we cannot determine the Petitioner's ability to pay the combined proffered wages of all of its applicable beneficiaries.

Accordingly, on remand, the Director should request evidence of the Petitioner's ability to pay the combined proffered wages of all of its applicable beneficiaries. The Petitioner may also submit additional materials in support of the factors discussed in *Matter of Sonegawa*, 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967), which permits USCIS to consider the totality of the circumstances affecting a petitioner's ability to pay the proffered wage.[14]

ORDER: The decision of the Director is withdrawn. The matter is remanded for the entry of a new decision consistent with the foregoing analysis.

[13] It is the Petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Skirball Cultural Ctr.*, 25 I&N Dec. 799, 806 (AAO 2012).

[14] In determining the Petitioner's ability to pay the proffered wage, we may examine such factors as: the number of years the Petitioner has conducted business; its number of employees; the growth of its business; its incurrence of uncharacteristic losses or expenses; its reputation in its industry; the Beneficiary's replacement of a current employee or outsourced service; or other factors affecting the Petitioner's ability to pay. *See Matter of Sonegawa*, 12 I&N Dec. at 614-15.